



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 12 OF 2019

JOHNSON OMOLLO SOLO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the sentence by Hon. R. K. Langat Magistrate

in Rongo Magistrate's Court Criminal Case No. 26 of 2018

delivered on 6/07/2018)

JUDGMENT

1. The appeal subject of this judgement is on sentence only. The Appellant herein, **Johnson Omollo Solo**, was charged with the offence of **Defilement** contrary to **Section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006** and with an alternative offence of **committing an indecent act with a child**. The Appellant denied both counts.

2. The particulars of the offence of defilement were that *'on the 5th day of October 2018 at [particulars withheld], unlawfully and intentionally caused your penis to penetrate the vagina of VA a girl aged 15 years old'*.

3. The Appellant was subsequently tried, found guilty and convicted on the offence of defilement. He was accordingly sentenced.

4. Five witnesses testified in support of the prosecution's case. **PW1** was a Clinical Officer attached to Awendo Sub-County Hospital. The mother to the victim testified as **PW2** whereas the victim, **VA**, testified as **PW3**. The Assistant Chief of Kanyasrega Sub-Location testified as **PW4** and the investigating officer one **No. 91318 Corp. Catherine Melina** attached to Awendo Police Station testified as **PW5**. The Appellant appeared in person during the trial and he was the victim's uncle. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court except for the victim (PW1) whom I will refer to as **'the complainant'**.

5. At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave a sworn defence and called one witness. Thereafter the court rendered its judgment on 06/07/2018 where the Appellant was found guilty of the offence of defilement and was convicted. He was sentenced to 20 years' imprisonment.

6. Being dissatisfied with the sentence, the Appellant preferred an appeal by filing a Petition of Appeal on 26/03/2019 (albeit out of time, but with leave of this Court) in challenging the judgment on the following seven main grounds: -

1. THAT I was convicted to 20 years imprisonment.

2. THAT I was the sole and breadwinner of my family of school going children who were since then dropped out of school and risk becoming destitute due to my incarceration.

3. THAT my family and the prolonged sentence subject them to severe suffering hence this request for a reduction of the sentence.

4. THAT I do earnestly and honestly feel remorseful for the offence which has resulted to substantial depravity to my six young children and octogenarian mothers as well as other dependants in the family.

5. THAT the same was a domestic duel between the appellant and his brother's wife and the appellant is so remorseful and repentant of what really happened and if given another chance he will not repeat such an act again.

6. THAT this appeal is against the sentence only merely requesting the court to just consider reducing the sentence imposed.

7. THAT may it please this Hon. Court to substitute the imprisonment term, with a non - custodial sentence for the interest of natural justice.

7. Directions were taken and the appeal was disposed of by way of written submissions where the Appellant expounded on the grounds of appeal. The Appellant prayed that the appeal on sentence be allowed and be reduced or substituted with a non-custodial one.

8. Mr. Kimanthi Senior Principal Prosecution Counsel opposed the appeal and submitted that the sentence was lawful and no reasons had been given to be varied. Counsel prayed that the appeal be dismissed.

9. This being the Appellant's first appeal on **sentence**, this Court is now called upon to deal with the sentencing court's exercise of discretion. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

10. The Appellant was sentenced to 20 years' imprisonment sentence under **Section 8(3)** of the **Sexual Offences Act**. The record is however clear that the court did not give the sentence because it was the minimum sentence in law. The court stated that it had considered the mitigation by the Appellant, that the Appellant was a first offender, the relationship between the complainant and the Appellant which placed the Appellant in a position of trust among many other factors as required under the Sentencing Guidelines.

11. Looking at the nature of the offence and the relationship between the complainant and the Appellant and in consideration of the Appellant's mitigations I do not see how the sentencing court erred in arriving at the sentence of 20 years' imprisonment.

12. The upshot is that the appeal is unmerited and is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 26th day of July 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Johnson Omollo Solo, the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant